



DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 6, 8, 10, and 11

[Docket No. TTB-2022-0011; Notice No. 216]

RIN: 1513-AC92

Consideration of Updates to Trade Practice Regulations

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) is seeking public comment on TTB's trade practice regulations related to the Federal Alcohol Administration Act's exclusive outlet, tied house, commercial bribery, and consignment sales prohibitions. President Biden's Executive Order 14036 ("Promoting Competition in the American Economy"), the Department of the Treasury's related February 2022 report ("Competition in the Markets for Beer, Wine, and Spirits"), and public comments related to that report have raised questions about whether these regulations could be improved. To assist the agency in formulating potential proposals to amend the regulations, TTB invites comments on the issues described in this document.

DATES: Comments must be received on or before [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may electronically submit comments to TTB on this advance notice of proposed rulemaking, and view copies of this document, its supporting materials, and any comments TTB receives on it within Docket No. TTB-2022-

0011 as posted at <https://www.regulations.gov>. A direct link to that docket is available on the TTB Web site at <https://www.ttb.gov/laws-and-regulations/all-rulemaking> under Notice No. 216. Alternatively, you may submit comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW, Box 12, Washington, DC 20005. Please see the **Public Participation** section of this document for further information on the comments requested regarding this advance notice of proposed rulemaking and on the submission, confidentiality, and public disclosure of comments.

FOR FURTHER INFORMATION CONTACT: Christopher Forster-Smith, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; telephone 202–453–1039 ext. 150.

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Section 105 of the Federal Alcohol Administration Act (FAA Act) prohibits producers, wholesalers, and importers of distilled spirits, wine, or malt beverages (i.e., industry members) from engaging in certain practices (collectively referred to as “trade practices”) that threaten the independence of retailers and/or give the industry members an unfair advantage over their competitors. See 27 U.S.C. 205. Apart from labeling and advertising (27 U.S.C. 205(e) & (f)), which are outside the scope of this document, section 105’s prohibited trade practices are:

A. *Exclusive outlet.* It is unlawful for any industry member to require, by agreement or otherwise, that any retailer purchase alcohol beverages from the

industry member to the exclusion, in whole or in part, of alcohol beverages sold or offered for sale by other persons. See 27 U.S.C. 205(a).

B. *Tied house*. It is unlawful for any industry member to induce any retailer to purchase alcohol beverages from the industry member to the exclusion, in whole or in part, of alcohol beverages sold or offered for sale by others, through any of the following means: (1) by acquiring or holding any interest in any license with respect to the premises of the retailer; (2) by acquiring any interest in the real or personal property owned, occupied, or used by the retailer in the conduct of its business; (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services or other thing of value, subject to exceptions prescribed by regulations; (4) by paying or crediting the retailer for any advertising, display, or distribution service; (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions as prescribed by regulations; or (7) by requiring the retailer to take and dispose of a certain quota of any alcohol beverages. See 27 U.S.C. 205(b).

C. *Commercial bribery*. It is unlawful for any industry member to induce any retailer or wholesaler to purchase alcohol beverages from the industry member to the exclusion, in whole or in part, of alcohol beverages sold or offered for sale by others, through the following means: (1) by commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, employee, or representative of the retailer or wholesaler. See 27 U.S.C. 205(c).

D. *Consignment sales*. It is unlawful for any industry member to sell, offer for sale, or contract to sell alcohol beverages to any retailer or wholesaler, or for any retailer or wholesaler to purchase, offer to purchase, or contract to purchase

any alcohol beverages on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale, or where any part of such transaction involves, directly or indirectly, the acquisition by such person, from the retailer or wholesaler, of other distilled spirits, wine, or malt beverages. See 27 U.S.C. 205(d).

TTB administers these FAA Act provisions pursuant to section 1111(d) of the Homeland Security Act of 2002, as codified at 6 U.S.C. 531(d). In addition, the Secretary of the Treasury (the Secretary) has delegated certain administrative and enforcement authorities to TTB through Treasury Order 120–01.

TTB has promulgated regulations at 27 CFR part 6 (“Tied-House”) specifying the practices that are means to induce under section 105(b) of the FAA Act, criteria for determining whether a practice is a violation of section 105(b) of the FAA Act, and exceptions to section 105(b)(3) of the FAA Act. TTB has promulgated regulations at 27 CFR part 8 (“Exclusive Outlets”) specifying arrangements which are exclusive outlets under section 105(a) of the FAA Act and criteria for determining whether a practice is a violation of section 105(a) of the FAA Act. TTB has promulgated regulations at 27 CFR part 10 (“Commercial Bribery”) specifying practices which may result in violations of section 105(c) of the FAA Act and criteria for determining whether a practice is a violation of section 105(c) of the FAA Act. TTB has promulgated regulations at 27 CFR part 11 (“Consignment Sales”) specifying arrangements which are consignment sales under section 105(d) of the FAA Act and containing guidelines concerning returns or exchanges of distilled spirits, wine and malt beverages from a retailer or wholesaler.

On July 9, 2021, President Biden issued an Executive Order titled “Promoting Competition in the American Economy.” See E.O. 14036, 86 FR 36987 (July 14, 2021). Section 5(j) directed the Secretary, in consultation with the Attorney General and the Chair of the Federal Trade Commission (FTC), to submit a report within 120 days “assessing the current market structure and conditions of competition [for beer, wine, and spirits], including an assessment of any threats to competition and barriers to new entrants[.]” The Order provided that the report should address unlawful trade practices that hinder smaller and independent businesses or new entrants from distributing their products; patterns of consolidation in production, distribution, or retail markets; and “any unnecessary trade practice regulations of matters such as bottle sizes, permitting, or labeling that may unnecessarily inhibit competition[.]”

Further, section 5(k) of the Order directed the Secretary, through the TTB Administrator, to consider within 240 days: (1) Initiating a rulemaking to update TTB’s trade practice regulations; (2) revising or rescinding any regulations that “unnecessarily inhibit competition;” and (3) “reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.”

Treasury Request for Information

On July 28, 2021, the Department of the Treasury (Treasury) issued a Request for Information (RFI) soliciting input from the public and industry regarding the current market structure and conditions of competition in the American markets for beer, wine, and spirits, including an assessment of any threats to competition and barriers to new entrants. See Notice No. 204, 86 FR 40678. Treasury received 827 public comments in response to this RFI (RFI

Comments), including numerous comments addressing the exclusive outlet, tied house, commercial bribery, and consignment sales prohibitions.

Treasury Report on Competition in the Markets for Beer, Wine, and Spirits

On February 9, 2022, Treasury, in consultation with the U.S. Department of Justice and the Federal Trade Commission, released a report titled “Competition in the Markets for Beer, Wine, and Spirits” (Report). The Report analyzes the markets for beer, wine, and spirits and, while finding significant growth over the last several decades in the number of small and “craft” producers of beer, wine, and spirits, the Report also finds significant concentration in certain markets. In addition, the Report analyzes the burden that complex regulations place on small businesses and new market entrants. To help address the competitive challenges in the beer, wine, and spirits marketplace, the Report identifies several recommendations, including evaluating trade practice enforcement policies, and reform of post-Prohibition era regulations that hinder small firms and new entrants from accessing the marketplace. The Report also recommends that TTB consider rulemaking to update its trade practice regulations under the FAA Act with an eye to giving a green light to practices that are essentially harmless and inherently procompetitive.

Comments Requested

TTB has not revised the trade practice regulations in over 20 years and recognizes that the regulations may not take into account current marketplace realities. Accordingly, in this advance notice of proposed rulemaking, TTB invites comments on updating the trade practice regulations listed in the **Background** section above (i.e., 27 CFR parts 6, 8, 10 and 11). To assist TTB in determining whether to proceed with developing specific regulatory proposals, TTB particularly invites comments on the following:

General Questions:

1. *Update trade practice regulations.* How might TTB update the trade practice regulations to clarify and/or modernize the categories of conduct that may result in exclusion or threaten retailer independence? How might TTB update the trade practice regulations to clarify and/or modernize any exceptions to those categories? Is there exclusionary conduct the current trade practice regulations overlook?

2. *Trade practice regulations and competition.* How might TTB update the trade practice regulations to authorize more practices that would not result in exclusion or threaten retailer independence, including any limits on those practices? How might TTB update the trade practice regulations to focus more on practices that have greater effect on the market?

3. *Digital marketplace.* How might TTB update the trade practice regulations to take into account current marketplace realities, especially in light of the rise of digital marketing strategies (e.g., digital coupons, instant rebate coupons, and virtual retail shelf space in digital retail storefronts where products may be purchased online)?

Specific Topics of Interest:

1. *Category management.* The Report and the RFI Comments both raised concerns about the threat that category management activities pose to retailer independence. One specific concern is that industry members, acting as category managers or captains for retailers, are either making the buying decisions for retailers or strongly influencing the retailers' buying decisions in a way that threatens retailer independence. How might TTB update the trade practice regulations to more thoroughly define and address category management activities to ensure that those activities do not lead to exclusion?

2. *Shelf plans.* Should TTB remove the exception which allows industry members to provide retailers with shelf plans and shelf schematics? See 27 CFR 6.99(b). Is providing shelf plans and shelf schematics a practice that places or has the potential to place retailer independence at risk? What additional services, whether furnished in conjunction with providing shelf plans or schematics or otherwise, place or have the potential to place a retailer's independence at risk?

3. *Slotting allowances (slotting fee) arrangements.* The TTB regulations provide that paying or crediting a retailer for any advertising, display, or distribution service is an inducement. The RFI Comments identified slotting fees as a major issue in the marketplace. TTB regulations do not expressly define slotting fees. TTB invites comments on whether TTB should update the trade practice regulations to include a definition of slotting fees, and, specifically, the extent to which such a definition should account for display space in the retail premises (e.g., shelves, designated high-visibility areas behind the bar, tap lines, well/rail placement, prominent placement on menus, or in featured drinks) as well as virtual display space (e.g., digital retail storefront, associated digital ad campaigns where products may be purchased online). TTB also seeks comments on whether the slotting fee definition should include free or subsidized equipment that is, by agreement or design, only able to display or dispense the furnishing industry member's products.

4. *Interest in a retail license or property.* TTB seeks comments on whether TTB should amend the tied house regulations to address crowdfunding and/or minority interest in a retail license/property as being an interest that would not result in an inducement. TTB also invites comments on whether TTB should

define a level of ownership interest that would not result in exclusion and, if so, what that interest should be.

5. *Third party companies.* Although TTB's tied house regulations apply to inducements furnished directly, indirectly, or through an affiliate, there may be some confusion pertaining to inducements made through third party companies. How might TTB amend the regulations to better address such inducements? How might TTB amend the regulations to address third party delivery/fulfillment services?

6. *Consumer specialty items and point of sale advertising materials.* Within certain limitations, TTB's tied house regulations allow industry members to provide retailers certain consumer specialty items and point of sale advertising. See 27 CFR 6.84. Some of these items, especially "alcoholic beverage lists or menus," have been used to provide hidden inducements to retailers. How might TTB update the list of specialty items and point of sale advertising materials allowed under the regulations to discourage their use for illicit purposes? Should TTB update the regulations to place monetary caps on these items?

7. *Tied House payment terms.* The tied house regulations currently allow for a 30-day extension of credit for retailers that would not result in an inducement. See 27 CFR 6.65. Should TTB consider allowing for longer payment terms for retailers? If so, what should those payment terms be?

8. *Consignment sales payment terms safe harbor.* TTB recently issued TTB Industry Circular 2022-1, "Payment Terms Under Consignment Sales Provisions," announcing a safe-harbor for 30-day payment terms, which the Circular deemed unlikely to result in a consignment sale arrangement. TTB seeks comments on whether it should amend the regulations to add specific safe harbor payment terms and, if so, what any such terms should be.

9. *Definition of trade buyer.* The FAA Act defines a “trade buyer” as “any person who is a wholesaler or retailer.” Similarly, TTB’s commercial bribery and consignment sales regulations define a “trade buyer” as “any person who is a wholesaler or retailer of distilled spirits, wine or malt beverages.” See 27 CFR 10.11 and 11.11. There has been some confusion about how such definitions apply to importers that wholesale (purchase for resale at wholesale) the products they import but are not required to obtain a separate wholesale basic permit pursuant to 27 U.S.C. 203(a)(2). TTB seeks comments on whether it should amend the regulations to clarify that trade buyers include persons engaged in wholesaling or retailing alcohol beverage products, regardless of permit status.

10. *Private label arrangements.* A number of RFI Comments expressed concerns about private label arrangements and how many of those arrangements may run afoul of the TTB trade practice regulations. Private label arrangements may involve an industry member contracting with a retailer to produce products on the retailer’s behalf creating the potential for exclusive outlet or tied house violations. TTB seeks comments on how its tied house and/or exclusive outlet regulations might address private label arrangements.

11. *Brand sharing with retail establishments.* Some industry members have directly or indirectly entered into arrangements whereby retailers are permitted or required to use an industry member’s brand name as part of the name of the retail establishment. TTB seeks comments on whether it should amend the regulations to specifically address brand sharing arrangements.

12. *Sponsorships.* A number of RFI Comments identified exclusionary concerns with sponsorships at ballparks, concert venues, and other events. How might TTB amend the regulations to clarify when this conduct may be exclusionary?

13. *Activities which result in exclusion or place retailer independence at risk.* Under the tied house, exclusive outlet, and commercial bribery regulations (27 CFR parts 6, 8, and 10, respectively), an inducement or requirement to purchase an industry member's products violates the FAA Act if such activity resulted in exclusion. See 27 CFR 6.21, 8.21, and 10.21. Exclusion occurs when (1) a practice of the industry member, whether directly or indirectly, places (or has the potential to place) retailer (or trade buyer with respect to commercial bribery) independence at risk by means of a tie or link between the parties or any other means of industry member control over the retailer or trade buyer; and (2) such practice results in the retailer or trade buyer purchasing less than it would have of a competitor's product. See 27 CFR 6.151, 8.51, and 10.51. The tied house and commercial bribery regulations specify certain practices deemed to place a retailer's or trade buyer's independence at risk. See 27 CFR 6.152 and 10.52. The exclusive outlet regulations specify certain practices that result in exclusion and other practices that do not result in exclusion. See 27 CFR 8.52 and 8.53.

TTB invites comments as to how it might update the regulations with respect to which practices place or have the potential to place retailer independence at risk, as well as which activities would result in exclusion under these parts. TTB also invites comments on whether it should clarify or alter the definition of exclusion in terms of "purchasing less" of a competitor's product, as provided in the regulations. See, e.g., 27 CFR 6.151(a)(2); 8.51(a)(2); 10.51(a)(2). For example, new retail establishments may have never purchased from competing industry members that did not induce or require such purchases. Should the regulations explicitly address that situation, and, if so, how? Should

TTB modify the regulations to establish and clarify levels of proof that would be deemed sufficient or insufficient to demonstrate exclusion?

14. *Criteria for determining a risk to retailer independence.* The tied house, exclusive outlet, and commercial bribery regulations provide specific criteria that indicate that a particular practice, other than those specifically listed in §§ 6.152, 8.52, 8.53, and 10.52, places retailer or trade buyer independence at risk. See 27 CFR 6.153, 8.54 and 10.54. TTB invites comments on how TTB might amend the regulations to provide additional clarity as to when a wholesaler or retailer's independence is at risk.

15. *Third party contracts.* The exclusive outlet regulations provide that contracts between an industry member and retailer, which require the retailer to purchase products from that industry member and expressly restrict purchase of such products from another industry member, are practices which result in exclusion. See 27 CFR 8.52. How might TTB clarify that such contracts between an industry member and a third party, where the third party controls the retailer, would also result in exclusion?

16. *Sales competitions.* A number of RFI Comments expressed concern that large industry members are engaging in commercial bribery activities by offering incentives, including, but not limited to, cash, airline tickets to tropical getaways, tickets to sporting events, flat screen televisions, and vacations for trade buyer sales representatives to push sales of the industry member's products. Current regulations provide that such inducements threaten trade buyer independence if provided to sales representatives in secret. TTB seeks comment on whether any such inducements threaten trade buyer independence regardless of whether they are provided in secret.

In addition to the specific requests for comments above, TTB is interested in receiving comments on any other issue or concern related to TTB's trade practice regulations.

As noted above, Treasury requested comments on, among other topics, the issue of trade practices in its recently published RFI regarding the current market structure and conditions of competition in the American markets for beer, wine, and spirits. Treasury received a number of comments on trade practices in response to that RFI, and TTB will consider those comments for the purposes of this advance notice of proposed rulemaking as well.

Public Participation

Comments Invited

TTB requests comments from industry members, consumers, and anyone interested in whether TTB should proceed with regulatory initiatives concerning the issues described above in this document. Please submit your comments by the closing date shown above in this document.

Submitting Comments

You may submit comments on this proposal as an individual or on behalf of a business or other organization via the Regulations.gov website or via postal mail, as described in the **ADDRESSES** section of this document. Your comment must reference Notice No. 216 and must be submitted or postmarked by the closing date shown in the **DATES** section of this document. You may upload or include attachments with your comment.

Confidentiality and Disclosure of Comments

All submitted comments and attachments are part of the rulemaking record and are subject to public disclosure. Do not enclose any material in your comments that you consider confidential or that is inappropriate for disclosure.

TTB will post, and you may view, copies of this document, its supporting materials, and any comments TTB receives about this proposal within the related Regulations.gov docket. In general, TTB will post comments as submitted, and it will not redact any identifying or contact information from the body of a comment or attachment.

Please contact TTB's Regulations and Rulings Division by email using the web form available at <https://www.ttb.gov/contact-rrd>, or by telephone at 202–453–2265, if you have any questions regarding how to comment on this proposal or to request copies of this document, its supporting materials, or the comments received in response.

Drafting Information

Christopher Forster-Smith of the Regulations and Rulings Division drafted this advanced notice of proposed rulemaking. Other TTB staff also participated in its development.

Signed: November 3, 2022.

Mary G. Ryan,

Administrator.

Approved: November 3, 2022.

Thomas C. West, Jr.,

*Deputy Assistant Secretary
(Tax Policy).*

[FR Doc. 2022-24435 Filed: 11/8/2022 8:45 am; Publication Date: 11/9/2022]